Supreme Court, U.S.
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CASE NO. 97-1702
IN THE UNITED STATES SUPREME COURT
October Term 1997

RIGOBERTO SANCHEZ-VELASCO,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

QUESTIONS PRESENTED

(Restated)

[Capital Case]

I.

Whether counsel, who has been discharged, has standing to file proceedings on behalf of the nominal petitioner, who has been determined to be competent, and who has not assented to this proceeding?

II.

Whether former counsel's claims regarding Mr. Sanchez-Velasco's waiver of counsel present a question of federal law, where he had no federal constitutional right to counsel and where his claim is premised only upon the assertion that the state-court factual finding of competence that was supported by the opinions of ten (10) expert witnesses is incorrect?

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RIGOBERTO SANCHEZ-VELASCO,
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THE STATE OF FLORIDA,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Sanchez-Velasco v. State, 702 So. 2d 224 (Fla. 1997). Parallel citation will be made to the opinion as published in the appendix to the petition, thus: "Pet. App. ___."

JURISDICTION

The Petition claims jurisdiction pursuant to 28 U.S.C. §1257(a). Respondent submits that because Mr. Bowen was dismissed as counsel in the state trial court, and has failed to demonstrate that the nominal petitioner, Mr. Sanchez-Velasco, desires that this petition be pursued, and has also failed to establish any basis for standing to bring this petition as a "next friend," the Court is without jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues presented in this capital case allegedly involve the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court set forth the following facts regarding Defendant's crime and the trial proceedings in the opinion under review:

> In summary, Sanchez-Velasco resided with Marta Molina in Hialeah. On December 12, 1986, Molina left her eleven-year-old daughter in the care of Sanchez-Velasco. Molina returned home from work that evening to find that her daughter had been murdered. Sanchez-Velasco was not at the apartment. The victim's face was swollen, and she was naked and bleeding from her vagina. A medical examination concluded that the victim was raped and that strangulation was the cause of her death. Missing from Molina's apartment were the victim's gold chains, her identification bracelet, and Molina's fur coat. Sanchez-Velasco was located by the police and questioned about the murder. Following proper Miranda warnings, Sanchez-Velasco confessed to robbery, rape, and murder. Sanchez-Velasco also remarked that he would prefer to be executed immediately rather than "rot in jail." The jury found Sanchez-Velasco guilty of first-degree murder, sexual battery of a victim under twelve years of age, and theft as a lesser included offense of grand theft. Upon the conclusion of the penalty phase, the jury recommended the death penalty by a vote of eight to four, and the judge imposed a sentence of death for the first-degree murder conviction.

> In his sentencing order, the trial judge found the following two aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel, and (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery. The judge found no statutory or nonstatutory mitigating circumstances. The judge explained in his order why he did not find Sanchez-Velasco's mental condition to be a mitigating circumstance.

Sanchez-Velasco v. State, 702 So. 2d 224, 225 (Fla. 1997)(footnote omitted)[Pet. App. 3-4]. On direct appeal, Mr. Sanchez-Velasco had raised six issues, all of which the Florida Supreme Court found to be without merit. Sanchez-Velasco v. State, 570 So. 2d 908, 916 (Fla. 1990). Mr. Sanchez-Velasco sought certiorari review of that decision, which was denied on May 13, 1991. Sanchez-Velasco v. Florida, 500 U.S. 929 (1991).

In the opinion under review, the Florida Supreme Court also noted that Mr. Sanchez-Velasco had been unanimously adjudged competent by several mental health professions during his trial:

> Sanchez-Velasco's competency to stand trial and waive certain rights was evaluated numerous times during the proceedings below. A pretrial mental health examination demonstrated that Sanchez-Velasco was competent at the time of the crime and competent to stand trial. A competency evaluation ordered by the trial judge during the trial again demonstrated that Sanchez-Velasco was competent to stand trial. During the penalty phase, a defense psychiatrist testified that Sanchez-Velasco suffered from an emotional disturbance, but was legally sane. Prior to sentencing, a second defense psychiatrist testified that Sanchez-Velasco possibly suffered from a neuropsychological dysfunction, but was legally competent at the time of the examination. By the conclusion of the trial, Sanchez-Velasco had

> been examined by no less than eight mental health experts, all of whom found him to be competent to proceed.

Sanchez-Velasco, 702 So. 2d at 225-26 [Pet. App. 4].

On May 13, 1993, Mr. Sanchez-Velasco, through counsel, and filed a Motion to Vacate Judgment of Conviction and Sentence, asserting sixteen claims. In relation thereto Defendant was examined by two doctors hired by his post-conviction counsel. The Florida Supreme Court noted their findings in the opinion under review:

> In support of the rule 3.850 motion, the defense retained Dr. Jorge Herrera and Dr. Alec Whyte to evaluate Sanchez-Velasco. Drs. Herrera and Whyte determined that Sanchez-Velasco suffered from significant psychological disorders. The defense planned to present the doctors' testimony at the rule 3.850 hearing to rebut the previous competency determinations.

Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 5]. The court also noted that Mr. Sanchez-Velasco had been examined in another then-pending murder case:

> During this same time period, Sanchez-Velasco underwent a competency evaluation by Dr. Richard Greer in connection with a separate murder trial in Broward County. Dr. Greer found Sanchez-Velasco competent in that case to represent himself and enter a guilty plea.

Id.[1]

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[1] The opinion contains a typographical error: the record reflects that Mr. Sanchez-Velasco was facing charges in Bradford, not Broward, County.

On March 31, 1994, and again on April 28, 1994, Mr. Sanchez-Velasco wrote to Florida Governor Lawton Chiles, requesting that no further appeals be undertaken on his behalf. (S.R. 10-12). Circuit Judge Thomas Wilson thereafter had three experts appointed to examine Mr. Sanchez-Velasco for competency, and set the matter for hearing on May 19, 1994. (R. 13). On that date, Mr. Sanchez-Velasco's brother, Fernando Sanchez, through Mr. Bowen, filed a petition in the Florida Supreme Court "as next friend" seeking to stay the proceedings "and all further proceedings which will expedite his execution." (Petition for Writ of Prohibition at 6-7). The Florida Supreme Court denied the petition on May 20, 1994. Sanchez v. Wilson, 639 So. 2d 980 (Fla. 1994). On May 23, 1994, Mr. Sanchez-Velasco withdrew his initial request to waive post-conviction proceedings.[2] (R. 763). On June 6, 1994, Judge Wilson recused himself and Judge Leonard Glick was assigned the case. (R. 13). On June 20, 1995, Mr. Sanchez-Velasco again wrote to the Governor, seeking to waive his post-conviction proceedings. (R. 776). On October 3, 1995, the trial court granted the State's motion to have Mr. Sanchez-Velasco colloquied on the issue. (1995 T. 4). On October 16, 1995, Mr. Sanchez-Velasco's counsel filed a petition for extraordinary relief in the Florida Supreme Court, seeking to prevent the colloquy. The petition was denied. Sanchez-Velasco v. Glick, 666 So. 2d 144 (Fla. 1995). On October 17, 1995, the trial court went forward with the colloquy of Mr. Sanchez-Velasco. (1995 T. 5, 9). After Mr. Sanchez-Velasco repeatedly declined to respond to a question propounded by him, Judge Glick concluded that Mr. Sanchez-Velasco was not "sincere" in his desire to waive his post-conviction appeals, and ordered the State to file a response to the Fla. R. Crim. P. 3.850 motion. (1995 T. 16-20, 22). After noting these proceedings the Florida Supreme Court concluded "that Sanchez-Velasco's own attorneys endeavored to ensure that none of the requests [by Mr. Sanchez-Velasco to waive collateral appeals]

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[2] Mr. Sanchez-Velasco subsequently explained that he withdrew the request to dismiss the motion at that time because when he was brought to Miami, his attorneys "surrounded him" with his entire family "young and old," who begged him to change his mind about giving up his appeals. (1995 T. 12).

were honored." Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 6].

On December 6, 1995, pursuant to a defense motion, Judge Glick recused himself. (R. 786, 842). Judge Victoria Platzer was assigned to the case. After the State filed its response, and the defense filed a reply, Judge Platzer held a hearing on August 29, 1996, and entered orders granting an evidentiary hearing as to two of the R. 3.850 claims and summarily denying the remainder. Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 5]. Prior to the scheduled evidentiary hearing, however Mr. Sanchez-Velasco again sought to discharge counsel:

> On October 24, 1996, Sanchez-Velasco moved to discharge his post-conviction counsel, Michael Bowen. Sanchez-Velasco claimed that Bowen could not effectively represent him because Bowen had only minimal contact with him, was not familiar with Florida law, and primarily practiced civil law. Sanchez-Velasco referred to Bowen as his "enemy," and asked the judge to force Bowen to stay at a distance from him 'before a misfortune could take place." Sanchez-Velasco also sought to have his rule 3.850 motion withdrawn and his execution expedited.

Id. The Florida Supreme Court detailed the subsequent proceedings in the opinion under review:

> Immediately following Sanchez-Velasco's motion, the trial judge questioned Bowen and determined that he was not ineffective in his representation. The judge then told Sanchez-Velasco that she would not appoint another attorney to represent him, and that he could either represent himself or continue with Bowen as his attorney. Sanchez-Velasco responded, "The reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney." The judge stated, "He appears very intelligent to me," but

> ordered an emergency competency evaluation before she ruled on whether Sanchez-Velasco could represent himself and waive his appeals. The next day, Dr. Sonia Ruiz personally interviewed and evaluated Sanchez-Velasco.

702 So. 2d at 226 [Pet. App. 7]. Dr. Ruiz issued a four-page, single-spaced report. The Florida Supreme Court quoted from her summarized conclusions:

> It is this evaluator's opinion that this defendant is fully competent to proceed. He has a factual and rational understanding of the proceedings. He has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. He appreciates the possible consequences of his decisions. He has the ability to manifest appropriate courtroom behavior. He has the capacity to testify relevantly in his behalf. There is no major mental illness noted. No overt thought disorder was present at the time of this examination. The defendant does not appear to suffer from a major mood disorder, such as major depression. He has no cognitive deficits. There are no apparent neurological deficits. His thoughts are clear and related in a coherent fashion. He did not express any suicidal or homicidal ideations. His affect and mood were deemed to be appropriate. No major mental illness or defect is deemed to be present that could interfere with his capacity to reasonably assist counsel

> or himself in his defense. No psychiatric interventions are deemed to be necessary at this time.

702 So. 2d at 226-27 [Pet. App. 7]. After Dr. Ruiz examined Mr. Sanchez-Velasco, the trial judge again colloquied him, as set forth in the opinion below:

> On October 25, 1996, the trial judge questioned Sanchez-Velasco to determine if he understood the consequences of waiving his post-conviction counsel and proceedings. The judge explored Sanchez-Velasco's age, education and employment history. The judge asked if Sanchez-Velasco understood that if he prevailed on the rule 3.850 motion he would be entitled to a new sentencing hearing. Sanchez-Velasco replied that he understood. The judge explained that by withdrawing the rule 3.850 motion his right to any further appeals would be forever lost, and again recommended that he represent himself or allow Bowen to represent him. Sanchez-Velasco stated that he understood the judge would not appoint another attorney for him, and that he did not want Bowen to serve as his attorney. Sanchez-Velasco then told the judge, "It's my right to represent myself and to withdraw my 3.850 motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision."

702 So. 2d at 227 [Pet. App. 7-8]. As noted in the opinion, the trial judge then determined that the evidence showed Mr. Sanchez-Velasco to be competent to waive his counsel and collateral appeals:

> On the basis of Dr. Ruiz's evaluation, the 1995 evaluation by Dr. Greer, and the colloquy, the trial judge found Sanchez-Velasco competent to dismiss his counsel and withdraw his rule 3.850 motion. The judge's order concluded as follows:

> The Court finds that the Defendant is well-aware and fully understands the consequences of his actions. The Court further finds that the Defendant has sufficient mental capacity, education and life experience to appreciate the nature of the proceedings and the consequences of withdrawing the Rule 3.850 and in representing himself.
>
> The Court finds the Defendant has freely, voluntarily, knowingly and intelligently waived his right to counsel for his collateral appeal. The Court further finds the Defendant, representing himself, has intelligently and knowingly moved to withdraw his Motion for Post-Conviction Relief and that the Defendant has the "right to control his own destiny to whatever extent remains." Durocher v. Singletary, 623 So.2d 482 (Fla.1993), at 484.

Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 8].

Mr. Bowen appealed to the Florida Supreme Court, which summarized his claims as follows:

> Bowen, Sanchez-Velasco's former counsel, now appeals the trial judge's order. Bowen claims that Dr. Ruiz's competency evaluation, upon which the trial judge's order was based in part, was facially deficient and Sanchez-Velasco was actually incompetent to represent himself and withdraw his rule 3.850 motion. Bowen asserts that Sanchez-Velasco's competency was placed in legitimate doubt at the hearing of October 24, 1996,

> when he simultaneously demanded to (1) dismiss Bowen due to ineffectiveness in pressing his post-conviction appeal and to (2) withdraw his post-conviction appeal. Bowen contends that Sanchez-Velasco's incompetence is demonstrated by the fact that his two demands are in diametric contradiction. Bowen claims it was this contradiction that likely prompted the trial judge to order Sanchez-Velasco's competency evaluation. Bowen asserts that the report submitted by Dr. Ruiz was insufficient because it failed to discuss or analyze this evidence of Sanchez-Velasco's incompetency. Bowen concludes that the order of the trial court cannot be sustained because it is based in part on the deficient competency report.

702 So. 2d at 227 [Pet. App. 8-9]. The Florida Supreme Court found these claims to be without basis:

> We disagree that Dr. Ruiz's report was deficient and find no reasonable basis for any doubt concerning Sanchez-Velasco's competency to dismiss his attorney and withdraw his post-conviction motion.

702 So. 2d at 227 [Pet. App. 9]. The court then reviewed its holding in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), which provided that when a capital defendant expresses a desire to dismiss collateral counsel and proceedings, the judge must conduct a "Faretta-type evaluation" to ascertain whether the defendant understands the consequences of his request. Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 9-10]. The court further noted that a competency evaluation was required only if, after inquiry, the trial court had "doubt" as to the defendant's competency. 702 So. 2d at 228 [Pet. App. 10], citing Durocher, 623 So. 2d at 483. The court concluded that the trial court had complied with Durocher:

> The trial judge fully followed the procedure outlined in Durocher in determining Sanchez-Velasco's competency to proceed.

Following Sanchez-Velasco's motion, the judge thoroughly explored his education and experience, and repeatedly stressed the implications of dismissing his collateral appeal. The judge determined that Sanchez-Velasco appeared to be "very intelligent" and "very competent." The record discloses that the judge then ordered the competency evaluation, not because she had a reasonable doubt as to Sanchez-Velasco's competency, but in an abundance of caution because Sanchez-Velasco was requesting to be put to death. The evaluation conducted by Dr. Ruiz was comprehensive and responsive to the needs of the trial court. Dr. Ruiz inquired about Sanchez-Velasco's childhood, education, employment history, religious beliefs, criminal history, relationship with his attorney, and decision to expedite his execution. Dr. Ruiz concluded in the report:

> Overall, this defendant presents as an individual who is fully competent to proceed with legal matters. There is no major mental disorder noted. There is no thought disorder, nor any major mood disorder evidenced at this time. He is able to reason properly, without any mental illness or defect interfering with his capacity to assist counsel or himself in his defense.

Upon receiving the report, the judge stated that Dr. Ruiz's findings and conclusions supported her own belief that Sanchez-Velasco was competent to make his own legal decisions. Dr. Ruiz's evaluation was consistent with nine other competency determinations. The judge's determination of competency was also supported by the fact that Sanchez-Velasco arrived at the hearing with a

> presumption of competence attributable to the previous determinations of his competency. See Whitmore v. Arkansas, 495 U.S. 149 (1990); Hunter v. State, 660 So. 2d 244 (Fla.1995); Durocher, 623 So. 2d at 484. The judge then discharged Bowen as Sanchez-Velasco's counsel and dismissed the rule 3.850 motion.

Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 10-11]. The Florida Supreme Court therefore rejected Mr. Bowen's claim that Dr. Ruiz's report failed to address the purported contradictions between Mr. Sanchez-Velasco's claims:

> We find that, to the extent such a contradiction may exist, it does not in and of itself lead us to doubt Sanchez-Velasco's competence in the face of at least ten evaluations determining him to be competent. Our decision in Durocher requires a mental health evaluation only when the Faretta-type evaluation leaves the judge with doubts as to the defendant's competency. Here, the record discloses that the judge had no such doubts but merely ordered the evaluation in an abundance of caution. In effect, she was making certain her conclusions were correct as well as consistent with prior competency determinations.

Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 11-12]. The court therefore affirmed the order of the trial court discharging Mr. Bowen and dismissing his rule 3.850 motion. 702 So. 2d at 228 [Pet. App. 12].

On or about January 29, 1998, Mr. Bowen filed a petition for writ of certiorari in this Court, seeking to proceed in forma pauperis. No affidavit of indigency was filed, apparently because Mr. Sanchez-Velasco declined to execute it.[3] This Court therefore denied the

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[3] See ¶¶5-6 of Mr. Bowen's Motion to Direct Clerk to File Request to Proceed in Forma Pauperis Without Petitioner's Affidavit, dated

motion to proceed in forma pauperis on February 2, 1998. The instant petition was then filed on or about April 10, 1998. The Court has ordered the State to file its brief in opposition by June 16, 1998.

February 18, 1998.

REASONS FOR DENYING THE WRIT

I. **MR. BOWEN LACKS STANDING TO FILE PROCEEDINGS ON BEHALF OF THE NOMINAL PETITIONER, WHO HAS BEEN DETERMINED TO BE COMPETENT, AND WHO HAS NOT ASSENTED TO THIS PROCEEDING.**

II. **MR. BOWEN'S CLAIMS DO NOT PRESENT A QUESTION OF FEDERAL LAW, WHERE HIS ONLY CHALLENGE IS TO THE STATE-COURT FACTUAL FINDINGS REGARDING THE WAIVER OF A STATE RIGHT.**

I.
MR. BOWEN LACKS STANDING TO FILE PROCEEDINGS ON BEHALF OF THE NOMINAL PETITIONER, WHO HAS BEEN DETERMINED TO BE COMPETENT, AND WHO HAS NOT ASSENTED TO THIS PROCEEDING.

In Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), this court held that before the merits of an issue may be considered, the "litigant must clearly and specifically set forth facts sufficient" to show that the litigant has standing. Further, the Court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Whitmore, 495 U.S. at 155-56. Mr. Bowen prefaces his petition with a plain statement that it is he, not the nominal petitioner, Mr. Sanchez-Velasco, who is seeking review:

> Michael Bowen, as special appointed post-conviction counsel for Rigoberto Sanchez-Velasco, movant, in the trial court and appellant in the Florida Supreme Court, respectfully petitions this Court ...

(Pet. 1).[4] Despite his self-characterization as appointed counsel, Mr. Bowen was in fact discharged of his duties as counsel in the state trial court, and that order was affirmed on appeal by the Florida Supreme Court. Mr. Bowen wholly fails to even allege any basis for his continued "representation" of Mr. Sanchez-Velasco. At best, then, Mr. Bowen is filing this petition as "next friend." Yet he proffers no grounds upon which such status might be conferred. Thus, there are no "allegations of standing" upon which this Court could "embellish" even were it authorized to do so. Under Whitmore, it follows that Mr. Bowen has no standing to prosecute the instant petition.

Whitmore is factually quite similar to this case. To the degree the cases differ, the instant case presents a more compelling basis for rejecting Mr. Bowen's petition.[5] In Whitmore, the defendant, Simmons, was convicted and sentenced to death. At the time of sentencing, Simmons professed a desire to waive all appeals. Pursuant to established state procedure, the trial court conducted a competency evaluation and determined that Simmons's waiver was knowing and intelligent. No direct appeal was taken to the Arkansas Supreme Court beyond review of the adequacy of the waiver inquiry. The inquiry was found valid by that court, and Whitmore, as "next friend," sought certiorari review in this Court.

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[4] As noted in the statement of the case, there is further evidence of Mr. Bowen's role as an intermeddler in Mr. Sanchez-Velasco's apparent refusal to execute an IFP affidavit.

[5] Unlike in Arkansas, direct appeal of a death sentence may not be waived in Florida. Farr v. State, 656 So. 2d 448, 450 (Fla. 1995). While in Whitmore the defendant had waived his right to direct appeal, here, Mr. Sanchez-Velasco's conviction and sentence of death have already been challenged on direct appeal. The Florida Supreme Court reviewed the proceedings and record and determined them to be valid. Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990). This Court declined to review that determination. Sanchez-Velasco v. Florida, 500 U.S. 929 (1991). As such, Mr. Bowen's right to intervene for the purpose of carrying out another round of assaults on presumptively valid conviction and sentence is even less substantial.

In the case at bar, Mr. Sanchez-Velasco professed a desire during the state-court post-conviction proceedings to waive any further challenges to his conviction and sentence, and to discharge collateral counsel. As in Whitmore, the trial court, following the established state procedure for such cases,[6] conducted a competency evaluation and determined that Sanchez-Velasco's waiver was knowing and intelligent. As in Whitmore, the Florida Supreme Court reviewed the adequacy of the waiver inquiry, and found the waiver valid. Sanchez-Velasco v. State, 702 So. 2d 224, 228 (Fla. 1997) [Pet. App. 12]. Now, as in Whitmore, Mr. Bowen, acting essentially as a purported "next friend," seeks certiorari review in this Court. For the reasons expressed in Whitmore, the petition should be denied.

In Whitmore, the court noted that in the habeas context, next friend" status "is by no means granted automatically to whomever seeks to pursue an action on behalf of another." 459 U.S. at 163. Rather, there must be some significant relationship between the next friend and the real party in interest, and the next friend has the burden "clearly to establish the propriety of the status and thereby justify the jurisdiction of the court." 459 U.S. at 164. These requirements exist to prevent the filing of federal claims by "intruders or uninvited meddlers." Id. Without deciding whether next-friend status was ever available absent statutory authorization, the Court concluded that any common-law right to such status would not be any broader than that permitted in the habeas context. 495 U.S. at 164-65. As such, one seeking the status may proceed only on a showing that "the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." 495 U.S. at 165.

In Whitmore, the Court concluded that the prerequisite for standing was not met where the state-court hearing established that the defendant had made a knowing, voluntary and intelligent waiver of his right to proceed. The Court noted that Arkansas required a competency hearing as a matter of state law. The Court further

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[6] See Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993).

observed that the state supreme court had affirmed the trial court's finding that the defendant was competent, and declined to disturb that judgment, despite counsel's claim that the waiver was invalid. Id. The Court therefore dismissed the petition for lack of standing. 495 U.S. 166.

As in Whitmore, the trial court here conducted a competency-to-waive inquiry pursuant to state law. As in that case, the trial court's determination was affirmed over counsel's claim that the waiver was invalid.[7] And, as in that case, there is no basis to disturb the state court findings that Mr. Sanchez-Velasco was competent to waive any further remedies.[8] As Defendant is competent, Mr. Bowen lacks standing,[9] and this petition should be dismissed.

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[7] The State did not challenge Mr. Bowen's standing to bring the appeal in the Florida Supreme Court, despite his dismissal as counsel at that point because the procedure dictated by that court in Durocher appears to contemplate review of the waiver proceedings. Neither the state-court procedures nor the State's acquiescence to Mr. Bowen's "representation" of Mr. Sanchez-Velasco in a state proceeding can confer jurisdiction on this Court, however. Notably, in the opinion of which he seeks review, Mr. Bowen is referred to as "former counsel" by the Florida Supreme Court. Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 8].

[8] See Point II, infra.

[9] There has also been no showing that Mr. Bowen possesses some "special relationship" with Mr. Sanchez-Velasco justifying his self-anointed role as next friend.

II.
MR. BOWEN'S CLAIMS DO NOT PRESENT A QUESTION OF FEDERAL LAW, WHERE HIS ONLY CHALLENGE IS TO THE STATE-COURT FACTUAL FINDINGS REGARDING THE WAIVER OF A STATE RIGHT.

Assuming, arguendo, that Mr. Bowen had standing to bring this petition, his claims would be without merit. He fails to explain how proceedings surrounding the waiver of counsel, in a context where there is no federal constitutional right to counsel, could violate Mr. Sanchez-Velasco's federal constitutional rights. Even assuming, arguendo, that the waiver implicated federal rights, Mr. Bowen raises no objection to the legal premises applied by the court below. Rather, his complaint is with the factual findings reached in the trial and appellate state courts. Claims of this sort rarely present a basis for review in this Court. Moreover, the substance of Mr. Bowen's factual claims, that Mr. Sanchez-Velasco was not competent to waive his rights, is also without merit where ten experts have examined him and determined him to be competent.

Mr. Bowen's entire argument is premised upon the notion that the waiver of state-court post-conviction counsel is governed by the Sixth Amendment of the United States Constitution. The soundness of that premise is by no means apparent, and Mr. Bowen fails to cite any authority supporting it.

This Court has held there is no federal constitutional right to counsel in state-court post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987); Coleman v. Thompson, 501 U.S. 722, 752 (1991)(no right to post-conviction counsel in capital proceedings). In Finley, this court also rejected the contention that once the state has granted such a right, the contours of that right are dictated by federal law. 481 U.S. at 558-59. Moreover, in Coleman, the court further clarified that where there is no Sixth Amendment right to counsel, no claim predicated on the Sixth Amendment may be asserted. 501 U.S. at 753. Mr. Bowen's reliance on Godinez v. Moran, 509 U.S. 389 (1993), is thus misplaced. The waiver-of-counsel aspect of that case is squarely based upon Faretta v.

California, 422 U.S. 806 (1972), Godinez, 509 U.S. at 399, which in turn rests on the Sixth Amendment. Faretta, 422 U.S. at 818.

Finally, in Finley, the Court concluded that where the right to post-conviction counsel is created by a state, its courts are the sole arbiters of whether the right had been satisfied. 481 U.S. 564. Below, the Florida Supreme Court determined that the trial court had properly complied with its holding in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), which governs the waiver of post-conviction capital counsel in Florida, in determining that Mr. Sanchez-Velasco was competent to waive Mr. Bowen's assistance. Plainly no federal question is presented, and the petition should be denied. Coleman, 501 U.S. at 729 ("this Court has no power to review a state law determination that is sufficient to support the judgment").

Even were a colorable Sixth Amendment issue presented, Mr. Bowen does not fault the procedure prescribed by the Florida Supreme Court in Durocher for determining the competence of a capital defendant to waive collateral review of his sentence.[10] Rather, his complaint is that the state courts should not have credited the multitude of experts who have examined Mr. Sanchez-Velasco and determined him to be competent. This Court has traditionally granted great deference to the states regarding the factual determination of competence. See Demosthenes v. Baal, 495 U.S. 731, 736-37 (1990)(federal appellate court erred in reweighing evidence of defendant's competency to waive post-conviction remedies after state court had found him competent); Maggio v. Fulford, 462 U.S. 111, 117-18 (1983)(federal appellate court erred in reweighing evidence of defendant's competency to stand trial after state court had found him competent). Although these habeas cases involve the application of the presumption of correctness under 28 U.S.C. §2254(d), they do establish that competence vel non is an issue of fact. This court generally defers to factual findings fairly supported by the record on

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[10] To the extent that he is claiming that the state-court procedure was inadequate, that claim is still based upon a factual premise that was rejected below: that there was a legitimate doubt as to Mr. Sanchez-Velasco's competency, as is discussed, infra.

direct review of state-court decisions as well. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); Arizona v. Fulminante, 499 U.S. 279, 287 (1991)("We normally give great deference to the factual findings of the state court"); Tison v. Arizona, 481 U.S. 137, 151 (1987)("We take the facts as the [state] Supreme Court has given them to us"); Barclay v. Florida, 463 U.S. 939, 947 (1983)(opinion of Rehnquist, J.)(Supreme Court's review of state court findings under state law "is limited to the question of whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution"); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-12 (1980)("we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances'"); Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1813, 1819 (1996)("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Given the abundant evidence of competence, it cannot be concluded that the Florida Supreme Court's application of its rule in Durocher was arbitrary. The petition thus fails to present any valid basis for this Court to accept review.

At the time of his trial, Mr. Sanchez-Velasco was examined by no less that 8 experts, none of whom was of the opinion that Mr. Sanchez-Velasco was incompetent. Sanchez-Velasco, 702 So. 2d at 225-26 [Pet. App. 4]. The Florida Supreme Court also cited the conclusion of competency of Dr. Richard Greer, Chief of the Division of Forensic Psychiatry at the University of Florida, who had examined Mr. Sanchez-Velasco in relation to his Bradford County case eleven months before the Durocher hearing and specifically found him to be competent. 702 So. 2d at 226, 227 [Pet. App. 5, 8], (S.R. 17). In view of the foregoing, Mr. Sanchez-Velasco plainly arrived at the Durocher hearing with a presumption of competency. Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 11]; Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995), cert. denied, 116 S. Ct. 946 (1996);

Durocher, 623 So. 2d at 484.[11] The Florida Supreme Court properly concluded that nothing that had occurred in the trial court would have caused a reasonable jurist to question Mr. Sanchez-Velasco's competence. As such, no further inquiry into Mr. Sanchez-Velasco's competency was required. See Durocher, 623 So. 2d at 485 (mandating a competency hearing only if a question arose in the judge's mind as to the defendant's competency); Drope v. Missouri, 420 U.S. 162, 180 (1975)(requiring inquiry only where circumstances create "sufficient doubt" as to defendant's competency); Godinez v. Moran, 509 U.S. at 398 (the level of competence required to waive counsel is the same as that required to stand trial). Nevertheless, despite her own expressed lack of doubt as to Mr. Sanchez-Velasco's competence, Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 10], the trial judge, in an abundance of caution, had Mr. Sanchez-Velasco examined by yet a tenth expert, who also concluded that Mr. Sanchez-Velasco was competent. With that opinion, combined with the court's own observations that Mr. Sanchez-Velasco appeared intelligent and aware of what was going on, the court concluded he was competent. 702 So. 2d at 228 [Pet. App. 11]. This fully complied with both Durocher and Drope.

In assessing competency, the question is whether the defendant had a sufficient reasonable degree of rational understanding of the proceedings. Godinez, 509 U.S. at 402 ("Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings"). Here, based upon the reports of ten experts, as well as its own observations, the trial court reasonably concluded that Mr. Sanchez-Velasco was competent. The Florida Supreme Court's own precedent requires that where the trial court had the opportunity to observe the defendant's behavior, to review documents written by the defendant, and review the proffer of expert evidence, the trial court's finding of competency will not be disturbed, absent evidence which "dispositively demonstrates" incompetence. Muhammad v. State, 494 So. 2d 969, 972-73 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987); Watts v. State, 593 So.

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[11] Such a presumption does not violate the constitution. See Whitmore; Medina v. California, 505 U.S. 437, 453 (1992).

2d 198, 201 (Fla.)(upholding finding of competency as not abuse of discretion; noting that counsel never challenged qualifications of experts below), cert. denied, 505 U.S. 1210 (1992). Mr. Bowen at no point in the trial court challenged that conclusion beyond his assertion that Mr. Sanchez-Velasco's requests were contradictory. Nor did he present evidence on appeal that "dispositively demonstrate[d]" that Defendant was not competent.

Thus, Mr. Bowen's central premise -- that Mr. Sanchez-Velasco's competency was "legitimately in doubt," (Pet. 13), is flawed. The only alleged evidence of incompetency cited by Mr. Bowen is the purported contradiction between Mr. Sanchez-Velasco's assertion that Mr. Bowen was not competent and his desire to terminate the proceedings. This alleged contradiction is not as irrational as Mr. Bowen would portray it to be. The hearing in question was the result of Mr. Sanchez-Velasco's fourth request to forego further proceedings. At the time of his initial request, Mr. Sanchez-Velasco was returned to Dade County for the purpose of determining his wishes. By Mr. Sanchez-Velasco's own description, his counsel then arranged to have all his family members, "young and old," surround him and persuade him, through emotion and guilt, to withdraw his request to terminate his appeals. (1995 T. 12). At the time of the second hearing regarding Mr. Sanchez-Velasco's waiver of his appeals, the VLRC attorneys filed a petition in the Florida Supreme Court seeking to prevent the trial court from colloquying him on the issue, and they and Mr. Bowen asserted that Mr. Sanchez-Velasco was not competent. (1996 T. 15). The latter action was a particular bone of contention Mr. Sanchez-Velasco had with Mr. Bowen's performance. (1996 T. 13). By the time of the hearing under review, the VLRC lawyers had withdrawn from representing Mr. Sanchez-Velasco due to their organization's demise. (R. 884-87).

With the VLRC attorneys gone, the only impediment to Mr. Sanchez-Velasco carrying out his desire to terminate the appeals process was Mr. Bowen. Seeking to have Mr. Bowen discharged, on whatever grounds were available, was therefore a rational way to achieve his oft-stated goal of ending the post-conviction proceedings. By all accounts, Mr. Sanchez-Velasco is intelligent, if unschooled in the law. His complaints against Mr. Bowen were factually grounded,

if ultimately legally unsound.[12] Tellingly, Mr. Sanchez-Velasco concluded his complaints concerning Mr. Bowen with the assertion that he wanted Mr. Bowen discharged and to waive his post-conviction rights. (1996 T. 11). Upon the court's suggestion that he consult with Mr. Bowen prior to seeking to waive his appeals, Mr. Sanchez-Velasco again asserted that he did not want or need an attorney:

> THE DEFENDANT: I appreciate your honor's intentions, but the reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney.

(1996 T. 19)(emphasis supplied). Later, during the Durocher colloquy, Mr. Sanchez-Velasco again asserted that he only wanted the attorneys to leave him alone and let him die in peace. (1996 T. 40).

Rather than the contradiction Mr. Bowen asserts, Mr. Sanchez-Velasco has consistently and repeatedly sought to waive his appeals. His attorneys have just as consistently and repeatedly sought to prevent that from happening. As such Mr. Sanchez-Velasco's attempt to get Mr. Bowen removed on the pretext of incompetence was wholly consistent and reasonable. Likewise, Mr. Sanchez-Velasco's perception of Mr. Bowen, who has sought to thwart his wishes at every turn, as his "enemy" is hardly remarkable. See also Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir 1995)(bizarre or irrational behavior cannot be equated with mental incompetence to proceed), cert. denied, 116 S. Ct. 2505 (1996); Hernandez-Hernandez v. United States, 904 F.2d 758, 761 (1st Cir. 1990)(rejecting argument similar to that presented by Mr. Bowen

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[12] Mr. Sanchez-Velasco asserted that Mr. Bowen was unqualified because he was not admitted in the State of Florida, primarily practiced civil law, lacked capital case experience, and had had little contact with Mr. Sanchez-Velasco, the witnesses, or Mr. Sanchez-Velasco's family. (1996 T. 3, 9-10). The trial court rejected, upon Mr. Bowen's responses, the claim that Mr. Bowen was not competent. The factual bases of Mr. Sanchez-Velasco's claim were not refuted, only the legal conclusions. (1996 T. 14-18).

because it "would require a competency inquiry in virtually every case in which an accused person makes a decision perceived by others as being unwise"). Finally, to the extent Mr. Bowen is suggesting that Mr. Sanchez-Velasco's incompetency should be presumed from his desire to forego further appeals, that notion has been squarely rejected:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of motive, suggests that preservation of one's own life at whatever cost is the summum bonum, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979)(Rehnquist, J.).

Nor do the cited reports of Drs. Whyte and Herrera meet Mr. Bowen's burden of dispositively demonstrating incompetence. First of all, at no time during the proceedings below did Mr. Bowen call them to the attention of the trial court. Moreover, these reports, particularly given the ten disinterested expert opinions to the contrary, are highly suspect. They alone of the opinions in the record were the product of experts hired by Mr. Sanchez-Velasco's post-conviction counsel. Further, their analysis of Mr. Sanchez-Velasco's competence in no way addressed the specific criteria for competence set forth in the Florida Rules of Criminal Procedure or Dusky v. United States, 362 U.S. 402 (1960). Rather, their conclusion that Mr. Sanchez-Velasco was incompetent at the time of trial was based largely upon their belief that Mr. Sanchez-Velasco was administered Thorazine on a daily basis at the time of trial. There has been no suggestion whatsoever that Mr. Sanchez-Velasco was being administered any psychotropic medications at the time of the 1996 proceedings. Indeed, Dr. Greer, who reviewed Mr. Sanchez-Velasco's prison medical records did not observe that Mr. Sanchez-Velasco was on any

medication at the time.[13] Further, these doctors' conclusion that Mr. Sanchez-Velasco suffered from various mental disorders (contrary to the findings of the other, non-partisan, experts) is not in itself relevant to the question of whether Mr. Sanchez-Velasco was competent. Medina, 59 F.3d at 1107 (not every manifestation of mental illness demonstrates incompetence; evidence must indicate present inability to understand the charges to support finding of incompetence); Coleman v. Saffle, 912 F.2d 1217, 1226 (10th Cir.)(no competency hearing was required despite evidence of previous hospitalization and mental illness where experts opined defendant was competent), cert. denied, 497 U.S. 1053 (1990); United States v. Pryor, 960 F.2d 1, 2 (1st Cir. 1992)(not determinative that defendant had drug problems and psychiatric treatment in the past).

Both Dr. Whyte and Dr. Herrera further based their belief that Mr. Sanchez-Velasco was incompetent upon Mr. Sanchez-Velasco's allegedly inappropriate courtroom behavior and disregard of counsel's advice. However, these factors, without more, also do not raise questions sufficient to raise questions of mental competency. Neither doctor persuasively related just how these alleged problems would have prevented Mr. Sanchez-Velasco from being able to knowingly and intelligently waive the right to counsel.

Finally, the cases upon which Mr. Bowen relies, in which no competency evaluation was conducted, despite the issue of competency having been raised, have no relevance to the issue Mr. Bowen posits. For example, in Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991), habeas relief was granted where the defendant moved prior to arraignment for a mental examination pursuant to Arkansas statutory provisions. The three doctors who examined the defendant were unable to reach a consensus as to their conclusions, and recommended further testing. Id. at 927-28. The defendant subsequently, against

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[13] Moreover, the defense experts' belief that Mr. Sanchez-Velasco was being medicated at the time of trial is not supported by any record evidence beyond the affidavit (also not brought to the trial court's attention) of an inmate who was also in the Dade County Jail in 1986.

the advice of counsel, withdrew the motion and proceeded to trial. Id. at 928. On the eve of trial, counsel again raised the issue of the defendant's competency. After merely asking the defendant how he felt about the competency issue, the court directed the trial to proceed. Id. Under these circumstances, the Circuit Court concluded that the defendant should have had a competency hearing. Id. at 930. The Eighth Circuit specifically noted that under its own precedent, in nearly every case where the denial of a competency hearing had been upheld, "'there was some form of psychiatric evidence'" that indicated to the court "'the absence of mental illness.'" Id. (quoting Harkins v. Wyrick, 552 F.2d 1308, 1311 (8th Cir. 1977)). Here, nine mental health professionals, all concluded before the Durocher hearing that Mr. Sanchez-Velasco was competent. An evidentiary hearing was held during trial, and the court concluded Mr. Sanchez-Velasco was competent. Thus unlike in Griffin, but more like Harkins, there was ample basis to have forgone a hearing. See also Treadwell v. Lockhart, 948 F.2d 453, 454 (8th Cir. 1991)(distinguishing Griffin where "a reasonable judge" would not have entertained doubt as to the defendant's competency where counsel presented no such evidence to the trial court). Mr. Bowen presents no authority that can be reasonably read as requiring more than that which the trial court did below. Mr. Bowen certainly did not in any way suggest to the trial court that he felt its procedures were inadequate. See Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996)(defense counsel's failure to raise issue at trial level was indicative of the lack of necessity for further competency proceedings), cert. denied, 117 S. Ct. 2440 (1997); United States v. Garrett, 903 F.2d 1105, 1117 (7th Cir.)(same), cert. denied, 498 U.S. 905 (1990); Cf. Griffin (counsel consistently objected to the procedure followed by the trial court); with United States v. Premachandra, 32 F.3d 346, 348 (8th Cir. 1994)(distinguishing Griffin where trial experts agreed defendant was competent and defense counsel did not request hearing in trial court). The Florida Supreme Court therefore properly followed state law, and affirmed. See Medina v. California, 505 U.S. 437, 451 (1992)("Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not"). In view of the foregoing, Mr. Bowen's postulation that a competency hearing was required is simply without merit.

In view of the foregoing, to the extent that he has even asserted the violation of any federal right, it is apparent that Mr. Bowen's real complaint is not with the state courts' procedures, but their factual findings. However, the state courts properly concluded, based on the record, that Mr. Sanchez-Velasco was competent, and that his waiver of collateral counsel and appeals was knowing, intelligent, and voluntary. Those factual findings should not be disturbed here, and Mr. Bowen's petition should be denied.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441